NATIONAL LABOR RELATIONS BOARD

EVERGREEN CHARTER SCHOOL,

Employer,

and

ALISON GREENE,

29-RD-175250

Petitioner,

and

EVERGREEN CHARTER STAFF ASSOCIATION, NYSUT, AFT,

Union.

REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION DATED MAY 27, 2016, SUBMITTED BY THE EVERGREEN CHARTER STAFF ASSOCIATION, NYSUT, AFT

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INTRODUCTION

The Evergreen Charter Staff Association, NYSUT, AFT ("Association" or "Union") submits this Request for Review of the May 27, 2016 Decision and Direction of Election ("Decision") of Regional Director James G. Paulsen of Region 29 of the National Labor Relations Board ("NLRB" or "Board"). In the Decision, the Regional Director found that Evergreen Charter School ("Evergreen") is a private employer - not a political subdivision of the State - and is subject to the jurisdiction of the NLRB. In making this determination, the Regional Director ignored the unambiguous law of the State of New York, which provides that charter schools are created directly by the State to operate within New York's public school system.

The statutory framework that governs the creation and regulation of charter schools in New York places them squarely within the category of "political subdivision" under the National Labor Relations Act ("NLRA" or "Act"). Charter schools established under New York law, including Evergreen, are, therefore, exempt from the jurisdiction of the NLRB pursuant to the

Act. Instead, they are governed by New York State's Public Employees' Fair Employment Act and under the auspices of New York State's Public Employment Relations Board. Thus, the Regional Director erred in finding that Evergreen is not a political subdivision of New York State.

Accordingly, pursuant to Section 102.67 of the Board's Rules and Regulations, the Association submits this Request for Review because: (1) the Decision erred on substantial factual issues that prejudiced the Association; (2) the Decision raises a substantial question of law or policy in the absence of, or a departure from, officially reported Board precedent; and (3) there are compelling reasons for reconsideration of an important Board policy.

PROCEDURAL HISTORY

On or about April 18, 2016, Alison Greene, a teacher at Evergreen, filed a decertification petition with Region 29 of the Board, requesting that the Association no longer represent employees at Evergreen. On May 12, 2016, a hearing on Ms. Greene's decertification petition was held before Board Agent Ioulia Fedorova. At the hearing, one witness testified, and the parties introduced several documents as joint exhibits (referred to hereinafter as "Joint Ex."). These documents relate to Evergreen's creation and operation. *See* Decision at p. 2. On May 27, 2016, the Regional Director issued the Decision, which found that Evergreen is not a political subdivision of New York State and is subject to NLRB jurisdiction. *See id.* The Regional Director directed an election to determine whether employees at Evergreen wish to be represented by the Association. *See id.* at p. 30. The Regional Director initially scheduled the election for June 15, 2016; however, at the Association's request, the election was re-scheduled for June 16, 2016. As the Regional Director improperly asserted jurisdiction over Evergreen, the Association submits the instant Request for Review of the Decision.

STATEMENT OF FACTS

A. The New York Charter Schools Act of 1998

The New York Charter Schools Act of 1998 ("Charter Schools Act") provides for the creation and operation of charter schools in New York State. *See* Education Law §§ 2850 *et seq.* The purpose of the Charter Schools Act is to "provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system." Education Law § 2850.2(e). The statute unambiguously states that a charter school established in New York is a "public school, except as otherwise provided in this article, and a *political subdivision* having boundaries coterminous with the school district or community school district in which the charter school is located." Education Law § 2853.1(c) (emphasis added).

In the establishment of a New York State charter school, the Charter Schools Act requires the direct participation of two public officials. First, an applicant must submit an application to a charter entity. Under the statute, a charter entity must be one of the following public bodies: (1) the board of education of a school district; (2) the board of trustees of the State University of New York; or (3) the New York State Board of Regents ("Regents"). *See* Education Law § 2851.3. If the charter entity approves the application, the charter entity and the applicant enter into a charter agreement. The charter entity then takes the next step in the application process by itself and submits a proposed charter to the New York State Board of Regents.

The Regents is the government body responsible for carrying out the powers and duties of the New York State Department of Education. *See* Education Law § 101. Each regent is elected by the New York State Legislature ("Legislature") to a seven-year term and the Regents

is vested with the authority to exercise "legislative functions concerning the educational system of the state." Education Law § 207.

The Charter Schools Act also regulates the operation of charter schools created in New York State. Any student who is qualified under State law to enroll in a public school is qualified to enroll in a New York charter school. *See* Education Law § 2854.2(b). Charter schools receive public funding from the school district in which they are located. *See* Education Law § 2856. The Charter Schools Act requires the school district in which the charter school is located to pay to the charter school tuition "for each student enrolled who resides in the school district." *See id.* The "tuition" paid to a charter school by a school district is set by a formula specifically provided for in the Charter Schools Act. *See id.*

Charter schools must also meet the same civil rights and student assessment requirements applicable to other public schools in New York State. *See* Education Law § 2854.1(b). Students with disabilities who attend charter schools must receive special education programs and services in accordance with any individualized education plan recommended by the student's school district. *See* Education Law § 2853.4(a).

Moreover, the Charter Schools Act regards charter school teachers as public school teachers. Charter school teachers, with limited exceptions, must be certified in accordance with the requirements applicable to other public schools. *See* Education Law § 2854.3(a-1). Unlike employees of privately operated schools in New York State, charter school employees may be deemed employees of the local school district for purposes of participation in the New York State's Teachers' Retirement System. *See* Education Law § 2854.3(c).

Notably, the Charter Schools Act also governs labor relations between charter schools and their employees. Consistent with the Legislature's intent to make charter schools public

schools, the Charter Schools Act designates charter schools as public employers for purposes of New York State's Public Employees' Fair Employment Act ("Taylor Law"), Civil Service Law §§ 200, *et. seq*. *See* Education Law § 2854.3. The Taylor Law governs collective bargaining between public employers and their employees in New York State. *See id.* Likewise, employees of charter schools in New York are declared public employees also subject to the Taylor Law. *See id.*

The State agency responsible for overseeing representation questions, collective bargaining, and Taylor Law violations is the New York State Public Employment Relations Board ("PERB"). *See id.* In providing a forum for the resolution of collective bargaining disputes between charter schools and their employees, the Legislature also provided a mechanism to ensure that charter schools comply with the Taylor Law. Under the Charter Schools Act, the Regents and a charter school's charter entity are vested the authority to terminate a charter if PERB makes a determination that the charter school has demonstrated "a practice and pattern of egregious and intentional violations of [the Taylor Law] involving interference with or discrimination against employee rights . . . ." Education Law § 2855.1(c).

In addition to regulating the creation and operation of charter schools, the Charter Schools Act also governs a charter school's closure or dissolution. When a charter school closes, its students are automatically transferred to the school district in which the charter school is located. *See* Education Law § 2851.2(t). Any public funds remaining with the charter school upon its closure are provided to the school district having resident children served by the charter school. *See id.*

The Charter Schools Act also provides both the charter entity and the Regents with authority to determine whether a charter school continues to exist during the term of the

provisional charter and after the provisional charter expires. Education Law § 2852.6 provides a charter entity with authority to reject an application by a charter school to renew a charter after the provisional five-year term expires. Such denial by a charter entity "is final and shall not be reviewable in any court or by any administrative body." Education Law § 2852.6; *see also Pinnacle Charter Sch. v. Bd. of Regents*, 108 A.D.3d 1024 (4th Dep't 2013); *New Covenant Charter Sch. Faculty Ass'n v. Bd. of Regents*, 30 Misc.3d 1205 (Alb. Sup. Ct. 2010). Finally, the Charter Schools Act provides the Regents and a charter school's charter entity with authority to terminate a charter for, among other things, serious violations of law, and material and substantial violations of the charter, including fiscal mismanagement. *See* Education Law § 2855.1(b)(c).

B. Evergreen Charter School.

Evergreen Charter School is located in Hempstead, New York, Nassau County and was granted its charter on January 13, 2009. *See* Joint Ex. 2. Specifically, it was granted a five-year charter by the New York State Education Department Board of Regents to operate an elementary school in Hempstead. *See* Joint Ex. 2. Evergreen provides a free public education to students in kindergarten through sixth grade. As of March 21, 2016, the New York State Education Department ("NYSED") approved Evergreen's expansion to the sixth grade starting April 1, 2016. *See* Joint Ex. 14 and 20.

Evergreen's original charter application was submitted directly to the Regents, acting as a charter entity. *See* Joint Ex. 1. The application was submitted by Sarah Brewster and Gil Bernardino (collectively "Applicants"). *See id.* The Regents approved Evergreen's application and entered into a charter agreement with the Applicants. *See* Joint Ex. 2; *see also* Transcript at

pp. 54-55.[1] The Regents thereafter incorporated Evergreen as a New York State education corporation and issued a provisional charter to Evergreen. *See id.*[2]

Evergreen is governed by a Board of Trustees ("Trustees"). *See* Joint Ex. 2 and 4. The Trustees are subject to bylaws, which must be approved by NYSED before being formally adopted by the Trustees. *See id.* Notably, though the Trustees elect new members to their board, pursuant to Evergreen's bylaws, "[t]rustees-elect assume office *subject to approval by the Charter Entity*. Each Trustee-elect becomes a member of the Board *subject to approval by the charter authorizer*." *See* Joint Ex. 4 (emphasis added). The record in this matter establishes that the New York State Board of Regents is the Evergreen's charter entity and charter authorizer.

Since its inception, Evergreen has been funded almost entirely by public money. In the application for its initial charter the Applicants projected most receipts to generate from local school districts. *See* Joint Ex. 1. For the year June 30, 2014 through June 30, 2015, at least 99.7% of Evergreen's support and revenue came from public sources. Joint Ex. 7. Similarly, during every year of operation, between 99.4% and 99.7% of Evergreen's support and revenue came from public sources. *See id.* Evergreen is funded almost exclusively with support and revenue from public sources, primarily local school districts. This revenue is almost entirely attributable to Evergreen's enrollment of resident students from the local school district. Therefore, Evergreen was funded primarily with revenues derived from billing the resident school district for resident pupils and from certain State and Federal aid attributable to these pupils. *See id.*

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[1] The record reflects the parties' agreement that the school would cease to exist without the New York State Board of Regents grant of the charter. Stated differently, notwithstanding the fact that private individuals completed the charter application, had the Regents denied Evergreen's application, the school would not have a charter agreement and could not exist as a charter school in New York State.

[2] Notably, the signatures of the co-Applicants as well as the Chancellor of the New York State Board of Regents appear on the provisional charter. *See* Joint Ex. 2; *see* Transcript at pp. 53-54.

Evergreen expects most of its future revenues to come from public funding. *See* Joint Ex. 14. According to Evergreen's most recent Charter Renewal Application, Evergreen's expects to receive most of its funding directly from local school districts. *See id.* Thus, most of Evergreen's projected income will be from public funds provided directly by the taxpayers of New York State. *See id.*

Evergreen is subject to oversight by the Regents. Joint Ex. 2. This oversight includes determining whether Evergreen continues to operate as a charter school in New York State. *See* Education Law § 2851.3(c). The Regents has renewed Evergreen's charter and modified it on various occasions since it issued Evergreen's provisional charter. Joint Ex. 3, 18, and 20.

Pursuant to the authority granted the Regents by the Education Law, NYSED has conducted numerous site visits on Evergreen. During these visits, NYSED collected information related to all facets of how Evergreen is managed. *See* Joint Ex. 8 and 9. In addition to allowing the Regents to conduct site visits, Evergreen is also required to submit annual reports to the Regents. *See* Joint Ex. 5 and 6. The Regents generates annual accountability and overview reports (Joint Ex. 21A, 22A, 23), comprehensive information reports (Joint Ex. 21B, 22B), as well as "report cards" (Joint Ex. 24 and 25) for the school, which are based on expansive pools of data Evergreen routinely submits to the State. Each of these documents is made available to the public through hyperlinks on the New York State Education Department's website.

The purpose of these regular site visits and annual reports is to ensure that Evergreen is in compliance with New York State law and regulations. *See* Joint Ex. 2 and 8. Evergreen faces substantial consequences if it fails to comply with the Charter Schools Act. Under the Charter Schools Act, a charter entity or the Regents may place a charter school on probationary status "to allow for the implementation of a remedial action plan." Education Law § 2855.3. If the charter

school does not comply with the remedial action plan, the charter may be summarily revoked. *See id.*

Evergreen is responsible for the hiring and firing of its employees. Nonetheless, Evergreen must comply with certain State requirements in connection with such employment determinations. Specifically, though Evergreen may select its own teachers, the school may "only" employ or otherwise utilize "those individuals who are certified in accordance with the requirements applicable to other public schools . . . ." *See* Joint Ex. 2 at 10. It is well established that all teachers employed in the public schools in New York State must hold a valid certificate issued in accordance with Education Law §§ 3001 and 3009, as well as Part 80 of the Regulations of the Commissioner of Education. Though the school may hire certain teachers that are exempted from certification under the Education Law, said exempted teachers "shall not in total comprise more than [30%] of the instructional employees of the Charter School, or [5] teachers, whichever is less." *See* Joint Ex. 2 at 10.

The New York State Teachers' Retirement System ("TRS") is a retirement system open to employees of public schools in New York State. Though Evergreen does not offer its instructional staff membership in TRS, pursuant to the charter agreement, "the employees of [Evergreen] may be deemed employees of the local school district for the purpose of providing retirement benefits, including membership in [TRS] and other retirement systems open to employees of public schools." *See* Joint Ex. 2 at 10. Therefore, Evergreen employees are eligible to participate in the public TRS.

The Association represents some of Evergreen's employees. The Association filed a Petition for Certification with PERB, seeking to be certified as the bargaining representative of teachers and various other employees at Evergreen. Evergreen voluntarily recognized the

Association as the exclusive bargaining representative of some of Evergreen's employees. Joint Ex. 17. PERB certified the Association as the exclusive bargaining representative of "teachers, teacher assistants reading specialists, nurses, and social workers." *See* Joint Ex. 11 and 17. After recognition, Evergreen, as a "public employer," was obligated to negotiate with the Association. Accordingly, the parties began negotiations and ultimately entered into a collective bargaining agreement. The Association's most recent collective bargaining agreement with Evergreen expires on June 30, 2016. *See* Joint Ex. 11.

ARGUMENT

POINT I

THE DECISION INCLUDES SUSBSTANTIAL FACTUAL ERRORS THAT PREJUDICED THE ASSOCIATION.

The Board may grant a Request for Review of a Regional Director's decision where the "decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party." NLRB Rules and Regulations § 102.67(c)(2). The Decision included the following substantial factual errors: (1) that Evergreen was created by individual Applicants and trustees, and not by the New York State Board of Regents; (2) that Evergreen was not created to constitute an administrative arm of the government; (3) that Evergreen is not administered by individuals who are responsible to public officials or to the general electorate; (4) that the Charter Schools Act and the Pennsylvania charter schools law are comparable; and (5) that certain decisions from the New York State Court of Appeals are relevant to the NLRB's jurisdictional inquiry.

These errors prejudiced the Association because the Regional Director mistakenly relied on them to determine that Evergreen is not a political subdivision under the NLRA. As a result, the Regional Director improperly found that Evergreen is subject to the NLRB's jurisdiction. For the reasons that follow, the Board should grant the Association's Request for Review.

A. The Regional Director erred in finding that Evergreen was created by individual trustees, and not by the New York State Board of Regents

In New York, the Board of Regents is the only body authorized to incorporate a charter school and to issue a charter. *See* Education Law §§ 2851.3(c); 2852.9-a(f). Upon the Regents' approval of a charter agreement, the Regents must issue a provisional charter and incorporate the charter school as a New York State education corporation. *See* Education Law § 2853.1. The Regents approved Evergreen's application and entered into a charter agreement with the

Applicants. *See* Joint Ex. 2. As a result, the Regents incorporated Evergreen as a New York State education corporation. *See id.* Before this public act, Evergreen did not legally exist and was not allowed to legally operate in New York State.

The Regional Director recognized that "[i]f the Board of Regents approves the proposed charter, it officially incorporates the applicants into a non-profit 'education corporation,' and issues a 'provisional charter,' for the purpose of operating the charter school . . . ." Decision at p. 5. The Regional Director later reiterated that "it appears that the New York State Board of Regents is specifically authorized by the state legislature to create the education corporation itself . . . ." *See id* at p. 26; *see also Matter of Fahari Acad. Charter Sch. v. Bd. of Educ. of City Sch. Dist. of City of New York, et al.*, 27 N.Y.S.3d 688, 689 (2d Dep't 2016) (noting that a Brooklyn charter school was chartered in 2008 by the State Board of Regents). However, the Regional Director then incorrectly held that that "Evergreen's Applicants" and "the other individual founding Trustees, not the Board of Regents," created Evergreen." Decision at p. 26. This error is contrary to the record evidence.

It is well settled that an employer is considered a political subdivision under the NLRA if it is "(1) created directly by the state, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB. v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn.* ("*Hawkins County*"), 402 U.S. 600, 604-605 (1971). The first prong of the test set forth in *Hawkins County* is satisfied when a local government body creates an entity pursuant to a state enabling statute. *See Hinds Cnty. Human Resource Agency* ("*Hinds County*"), 331 NLRB No. 186 (2000). Here,

a government body, the Regents, created Evergreen pursuant to an enabling statute, the Charter Schools Act. Therefore, the first prong of the *Hawkins County* test is satisfied.[3]

In light of the test set forth in *Hawkins County*, and its application in *Hinds County*, the Regional Director should have determined that a "government body" created Evergreen. Instead, the Regional Director incorrectly held, without any factual support, that "Evergreen's Applicants" and "the other individual founding Trustees, not the Board of Regents," created Evergreen." Decision at p. 26. This substantial factual error prejudiced the Association because the Regional Director relied on it on finding that Evergreen was not created by New York State and is therefore subject to the NLRB's jurisdiction. Accordingly, the Board should grant the Request for Review.

B. The Regional Director erred in finding that Evergreen was not created to constitute an administrative arm of the government

The Regional Director's Decision also declared that even assuming the Regents directly created Evergreen, the Board would not find that it was done so as to constitute an administrative arm of the government, because "governance and control of the charter school are 'vested solely in the private incorporators' rather than in public entities such as the local school districts or the SED." Decision at p. 26. The Regional Director also found that Evergreen "must be considered

[3] To the extent the Regional Director relied upon *Research Found.*, 337 NLRB No. 152 (2002), such reliance was in error and is distinguishable from the instant matter. The employer in *Research Foundation* was created pursuant to Education Law § 216, a completely different statutory scheme than that which applies to Evergreen. *See id.* Education Law § 216 varies significantly from the Charter Schools Act. For example, under Education Law § 216, a corporation may be formed pursuant to New York's Business Corporation Law, Not-For-Profit Law, or the Education Law. Under the Charter Schools Act, however, an education corporation, such as Evergreen, can only be formed pursuant to an affirmative vote by the Regents. Furthermore, Evergreen's creation involved direct involvement by a public body, the Regents, which issues a provisional charter establishing Evergreen as an education corporation. The employer in *Research Foundation* was created by twelve private incorporators. *See Research Foundation.* Unlike in *Research Foundation,* the Regents clearly created Evergreen when it voted pursuant to Education Law §§ 207 and 2853.1 to incorporate Evergreen as a New York State education corporation and authorize the initial Trustees.

a government contractor and employer subject to the Board's jurisdiction." Decision at p. 2. These factual findings were erroneous based on the record evidence.

In determining whether an entity was created to constitute a department or administrative arm of the government, the Board considers a myriad of factors and no one factor is determinative. *See Univ. of Vermont*, 297 NLRB 291 (1989); *New York Inst. for the Educ. of the Blind*, 254 NLRB 664 (1981); *Jervis Pub. Library Ass'n*, 262 NLRB 1386 (1982). The Decision however, disregards almost all of the factors typically considered by the Board in this inquiry. Had the Regional Director undertaken the proper analysis, he would have concluded that Evergreen, like all charter schools established in New York State, was created to constitute a department or administrative arm of the government.

One factor the NLRB considers in determining the narrow question of whether the employer was created so as to constitute a department or administrative arm of the government is the state's characterization of the entity. *See Hinds County*, at *2 (providing that the "Board has found the state's characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of the government"); *see also New York Inst. for the Educ. of the Blind*, 254 NLRB No. 85. Instead of affording New York State's characterization of charter schools "careful consideration" as required by *Hawkins County*, the Regional Director failed to give the Charter Schools Act any consideration. *See Hawkins County*, at 602.

The Charter Schools Act unambiguously states that charter schools are within New York State's public school system. *See* Education Law § 2850.2(e). The statute further states that "[t]he powers granted to a charter school under [the Charter Schools Act] constitute the performance of essential public purposes and governmental purposes of [New York State]."

Education Law § 2853.1. Moreover, the Legislature recently amended the Charter Schools Act, to provide that a charter school "is a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located." Education Law § 2853. Finally, the Charter Schools Act identifies charter schools as public employers subject to New York State's Taylor Law for the purpose of collective bargaining. *See* Education Law § 2854.3. While the Charter Schools Act repeatedly and explicitly delineates charter schools as public schools, the Regional Director discounted the statute's characterization to determine that Evergreen was not created to constitute a department or administrative arm of government. This determination was in error.

In addition to ignoring the legislative intent of the Charter Schools Act, the Regional Director also ignored the record evidence demonstrating that Evergreen possesses a majority of the characteristics the Board commonly associates with being an administrative arm of the government. *See, e.g., New York Inst. for the Educ. of the Blind*, 254 NLRB No. 85 (finding that New York school for the blind was created to fulfill state's constitutional obligation to provide a suitable education to blind students and was an administrative arm of the government); *Jervis Pub. Library Ass'n, Inc.*, 262 NLRB No. 145 (determining that library was an administrative arm of the government because of significant degree of operating and budgeting control, and its history as a state-authorized educational facility); *Hinds County*, at *2-*3 (concluding that human resource agency which received substantially all of its funding from the state, county, and federal government, together with governmental control over auditing procedures was an administrative arm of the government).

Since its inception, Evergreen has been funded almost entirely by public funds, with no opportunity to engage in arm's length negotiations with the State or the school district in which it

is located. *See* Education Law § 2856; *see also* Joint Ex. 7. The overwhelming amount of public funding that Evergreen receives to operate requires a finding that Evergreen was created to constitute an administrative arm of the government. *See Hinds County*, at *2.

Moreover, in addition to its extensive public funding, Evergreen is also subject to significant oversight by the Regents which also acts as Evergreen's charter entity. The purpose of this oversight is to ensure that Evergreen complies with the law. The Charter Schools Act provides:

> [t]he [Regents] and charter entity shall oversee each school approved by such entity, and may visit, examine into and inspect any charter school, including the records of such school, under its oversight. Oversight by a charter entity and the [Regents] shall be sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions.

Education Law § 2853.2. Accordingly, pursuant to this section of the Charter Schools Act, throughout Evergreen's existence, NYSED's Charter School Office conducted numerous site visits on Evergreen. *See* Joint Ex. 5 and 6. Pursuant to the law, Evergreen is also required to submit annual reports to the Regents. *See* Joint Ex. 5, 6, 21A, 22A, and 23.

In reaching his conclusion, the Regional Director trivialized Evergreen's extensive public oversight by likening it to the mere renewal of a government contract or to subjecting an entity to licensing requirements. *See* Decision at p. 27. The Regional Director erred in ignoring the breadth of the public oversight over Evergreen. In doing so, the Regional Director improperly found that Evergreen was not created to constitute a department or administrative arm of the government.

Participation in a state's public pension plan is a factor considered by the Board in determining whether an employer is a department or administrative arm of government. *See*

Jervis Pub. Library at **3. Though the Regional Director considered this factor, he erred in concluding that "Evergreen's employees are not eligible to participate in the public Teachers Retirement System." Decision at p. 15. This assertion is directly contrary to the record. Pursuant to the charter agreement, "the employees of [Evergreen] may be deemed employees of the local school district for the purpose of providing retirement benefits, including membership in [TRS] and other retirement systems open to employees of public schools." *See* Joint Ex. 2 at 10. Therefore, though Evergreen opts not to participate in TRS, its employees are nonetheless eligible for participation in the same. Accordingly, the Regional Director erred in interpreting and applying an important factor in determining whether Evergreen was created to constitute a department or administrative arm of government.

Finally, the case law relied on by the Regional Director does not support his determination that Evergreen is a government contractor or that Evergreen was not created to constitute an administrative arm of the government. The facts in *Research Found. of the City of New York* ("*Research Foundation*"), 337 NLRB No. 152 (2002) are distinguishable from Evergreen and, therefore, the Regional Director's reliance on *Research Foundation* was in error.

In *Research Foundation*, the Board found that the employer was created for the purpose of administering grants and contracts awarded to the City University of New York ("CUNY"). *See id.* at 965. The relationship between the employer and CUNY was governed solely by contract. *See id.* at *7. The employer did not receive any public monies. *See id.* at *2. Moreover, the Board found that the employer *Research Foundation* did not provide educational services in the same manner as CUNY. *See id.* at 85. Based on these facts, the Board determined that the employer was not created to constitute an administrative arm of the government.

Contrary to the employer's simple contractual relationship to CUNY in *Research Foundation*, Evergreen's relationship with the Regents is governed first by the Charter Schools Act, second by the provisional charter, and third by its charter agreement. Unlike the employer in *Research Foundation*, as set forth above, Evergreen is almost exclusively publicly funded. More importantly, Evergreen, unlike the employer in *Research Foundation*, provides the exact same services to its students as traditional public schools. *See* Education Law § 2850.2(e). Accordingly, Evergreen is clearly distinguishable from the employer in *Research Foundation.*

Similarly, any reliance by the Regional Director on the Board's decision in *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (2012)[4] to determine that Evergreen is not an administrative arm of the government is also in error. The Board's holding in *Chicago Mathematics*, as it related to the first prong of the *Hawkins County* test, was resolved solely by its direct creation analysis, without reaching the "arm of the government" portion of the test. *See id.* at *10.

The record demonstrates, contrary to the Regional Director's determination, that "governance and control" of Evergreen is vested with a public official – the Regents. Taken with the fact that Evergreen is almost exclusively publicly funded, provides the same exact educational services as traditional public schools, and its employees are eligible to participate in the State's pension plan demonstrates that Evergreen is clearly an administrative arm of the government. The Decision finding that Evergreen was not an administrative arm of the government was based on substantial mistakes of fact and inapposite case law. These mistakes prejudiced the Association because they resulted in a finding that Evergreen is not a political subdivision of New York State. Therefore, the Board should grant the instant request for review.

[4] *Chicago Mathematics*, including its precedential value, is discussed in greater detail at Point II.

C. The Regional Director erred in finding that Evergreen is not administered by individuals who are responsible to public officials or to the general electorate.

The Regional Director also incorrectly determined that Evergreen's Trustees are not responsible to public officials or the general electorate. *See* Decision at p. 28. The record establishes that the Regents appointed Evergreen's initial Trustees. Additionally, all Evergreen Trustees are subject to removal by the Regents. The Regional Director's Decision to the contrary is erroneous on these substantial factual issues.

Under the second prong of the test set forth in *Hawkins County*, in determining whether an entity is administered by individuals who are responsible to public officials or to the general electorate, "the Board looks to whether or not those individuals are appointed by and subject to removal by public officials." *State Bar of New* Mexico, 346 NLRB No. 64 (2006) (citations omitted). In New York, applicants seeking to operate a charter school are required to submit a proposed list of the initial board of trustee members to the charter entity, in this case, the Regents. *See* Education Law § 2851.2(c). The charter entity may approve or reject the application, which must also include identification and background information for all applicants and proposed board of trustee members. *See* Education Law §§ 2851.2(m); 2852.3. If the charter entity approves the application, it enters into a proposed charter agreement with the applicant, not the board of trustees. *See* Education Law § 2852.5. The charter entity then submits the proposed charter agreement to the Regents. *See id.* If the Regents incorporates the charter school, the Regents also appoints the charter school's first board of trustees. *See* Joint Ex. 2.

The Applicants submitted Evergreen's original charter application directly to the Regents, acting as a charter entity. *See* Joint Ex. 1. The Regents approved Evergreen's application and subsequently entered into a provisional charter agreement with the Applicants,

which created Evergreen as an education corporation. *See* Joint Ex. 2. In the provisional charter, the Regents also appointed Evergreen's trustees. *See id.* Evergreen's Trustees would not be trustees without the Regents' action granting the provisional charter and setting forth the names and addresses of the first trustees. Accordingly, the Regional Director erred in finding that Evergreen's Trustees were not appointed by public officials.

In addition, the Regional Director erred in finding that the Evergreen's Trustees are not subject to removal by public officials. *See* Decision at pp. 28-29. The Regional Director noted that "neither the Charter School Act or the Education Law expressly bestows... authority" to the Regents to remove trustees of education corporations. *Id.* at p. 29. This assertion directly contradicts the Charter Schools Act and its incorporation of Education Law § 226. *See* Education Law § 2853.1(b). Education Law § 226.4 provides the Regents with the authority to

> [r]emove any trustee of a corporation created by [the Regents] for misconduct, incapacity, neglect of duty, or where it appears to the satisfaction of the [R]egents that the corporation has failed or refuses to carry into effect its educational purposes.

Accordingly the Charter Schools Act specifically grants the Regents with full authority to remove a member of Evergreen's Trustees.

The Regents' authority to appoint and remove a member of Evergreen's Trustees derives from Evergreen's legal status as a New York State education corporation. Under New York law, an education corporation is a corporation chartered or incorporated by the Regents. *See* Education Law § 216-a. Contrary to the clear prescriptions of the statute, the Regional Director found that that the Charter Schools Act does not provide a public official with the ability to remove Evergreen's Trustees. As such, the Regional Director committed another factual error, which prejudiced the Association because it contributed to an improper assertion of NLRB

jurisdiction over Evergreen. The Board should therefore grant the Association's Request for Review.

D. The Regional Director's reliance on *The Pennsylvania Cyber Charter School* was erroneous.

On April 9, 2014, the Board declined to review a decision of the regional director in *The Pennsylvania Cyber Charter School* ("*Pennsylvania Cyber*"), 2014 WL 1390806 (N.L.R.B.) (2014), finding no distinction from Illinois law in the manner that Pennsylvania law provides charter schools to be established.[5] Pennsylvania's charter school law is distinguishable from New York's Charter Schools Act and the manner in which Evergreen was established. The Regional Director therefore improperly relied on *Pennsylvania Cyber* to determine that Evergreen is not a political subdivision under the NLRA. This error prejudicially affected the Association because it led to an improper assertion of Board jurisdiction.

First, in Pennsylvania, an applicant to establish a charter school is only required submit an application to the local board of school directors, which may grant or deny the application and issue a charter authorizing the operation of a charter school. *See* 24 P.S. §§ 17-1717-A(a)–(c). Moreover, Pennsylvania law provides that a charter can only be issued to a school organized as a non-profit corporation. *See* 24 P.S. § 17-1720-A(a). In *Pennsylvania Cyber*, the regional director found that private individuals created the charter school because the individuals who filed for non-profit corporate status were not public officials. *See* Regional Director's Decision and Direction of Election, *Pennsylvania Cyber Charter School and PA Cyber School Education Association, PSEA/NEA*, Case 06-RC-120811, issued February 24, 2014 ("DDE") at 13.

[5] As discussed in greater detail at Point II, the Board's decision denying review of the regional director's decision in *Pennsylvania Cyber* was based largely on *Chicago Mathematics*. In light of the decision of the United States Supreme Court in *NLRB v. Noel Canning*, 573 U.S. __ (2014), *Chicago Mathematics* is now without precedential value. Accordingly, the Regional Director's reliance on both *Chicago Mathematics* and *Pennsylvania Cyber* was erroneous.

Contrary to Pennsylvania, in New York, there is a two-step process, which requires the exclusive action of two public agents -- the charter entity and the Regents. Under the Charter Schools Act, the charter entity is an essential party to the creation of a charter school since it, and only it, can submit a proposed charter application to the Regents for approval.[6] *See* Education Law § 2852.5. This is a crucial distinction between the two statutory schemes: in New York, the establishment of a charter school occurs after the charter entity, a public body, applies to another public body, the Regents. The Regents, after an affirmative vote, then creates the charter school by incorporating the charter school as a New York State education corporation.

In light of the considerable distinctions between New York law and Pennsylvania law, the Regional Director improperly relied on *Pennsylvania Cyber* to assert jurisdiction over Evergreen. The test set forth in *Hawkins County* requires the Board to conduct the jurisdictional inquiry by reviewing the creation of New York charter schools pursuant to the Charter Schools Act. As set forth above, Evergreen satisfies the test set forth in *Hawkins County*, and is a political subdivision of New York State. Accordingly, because the Regional Director mistakenly relied on *Pennsylvania Cyber*, the Board should grant the Association's Request for Review.

E. The Regional Director's reliance on New York State Court of Appeals decisions *DiNapoli* and *Smith* was erroneous

In finding that Evergreen is an employer subject to the Board's jurisdiction, the Regional Director relied upon two New York State Court of Appeals ("Court of Appeals") decisions: *New York Charter Sch. Ass'n v. DiNapoli* ("*DiNapoli*"), 13 N.Y.3d 120 (2009) and *New York Charter Sch. Ass'n v. Smith* ("*Smith*"), 15 N.Y.3d 403 (2010). For the reasons that follow, these Court of Appeals cases are irrelevant to the inquiry here.

[6] Here, the Regents also acted as Evergreen's charter entity.

In *DiNapoli*, the Court of Appeals determined that the Legislature exceeded its constitutional authority when it assigned the New York State Comptroller to audit charter schools pursuant to Article V, § 1 of the New York State Constitution. *See DiNapoli*, 13 N.Y.3d at 131. The inquiry under *DiNapoli*, therefore was based on the New York State Comptroller's constitutional authority. *See id.* at 131-132.

The inquiries concerning whether an entity is a political subdivision within the meaning of the New York State Constitution, the NLRA, or even New York's Taylor Law are all different. *See e.g., Patterson v. Carey*, 41 N.Y.2d 714, 724 (1977) (finding that a public benefit corporation is not a political subdivision within the meaning of Art. V, §1 of the New York Constitution); Civil Service Law § 201(6)(a) (including a public benefit corporation in the Taylor Law's definition of a public employer); *Hawkins County*, 402 U.S. at 604-605 (setting forth the test for a political subdivision under the NLRA). As such, any reliance by Regional Director's on *DiNapoli* is erroneous. The *DiNapoli* Court did not address the scope or meaning of the NLRA or whether the Taylor Law governs charter schools and their employees; nor did the court engage in any discussion or analysis over whether charter schools are political subdivisions of New York State. *See DiNapoli*, 13 N.Y.3d at 131. Instead, the *DiNapoli* Court specifically noted that the political subdivision argument was not before it for review. *See id.* Nevertheless, the Court of Appeals also specifically held that the duty to supervise and oversee charter schools lies with the Regents and the charter school's charter entity, not the New York State Comptroller. *See id.* at 133. Accordingly, the decision in *DiNapoli* only addressed the constitutionality of the Comptroller's ability to audit all New York State school districts, including charter schools. *See id.* at 127-30.

In the instant matter, the inquiry before the Board is whether Evergreen was created by the State to constitute an administrative arm of government, or whether Evergreen is responsible to public officials or the general electorate. *See Hawkins County*, 402 U.S. 600. As argued above, Evergreen satisfies this inquiry. Accordingly, because the *DiNapoli* Court did not undertake the analysis required under *Hawkins County*, the decision is without precedential or persuasive value here.

Moreover, the Court of Appeals decision in *Smith* similarly has no bearing on the Board's inquiry. The *Smith* Court held that charter schools in New York State are not public entities under New York's Labor Law (New York State's prevailing wage law). The Court relied on the fact that only four public entities are delineated under Labor Law § 220. In its holding, the Court reasoned that New York education corporations were not included among the entities listed in this provision of the Labor Law and as a result, determined that the charter schools at issue were not subject to the prevailing wage laws. The holding of the Court of Appeals in *Smith*, determining that charter schools in New York are not "public entities" has no bearing on whether charter schools created pursuant to the Charter Schools Act are political subdivisions exempt from Board jurisdiction under the NLRA.

Moreover, the Regional Director failed to give the administrative decisions of New York's PERB asserting jurisdiction over New York charter schools the proper weight as these decision undertake the appropriate analysis required by *Hawkins County*. PERB's decision in *Council of Supervisors (Brooklyn Excelsior)* ("*Brooklyn Excelsior*"), 44 PERB ¶ 3001 (2011) addresses the very inquiry the Regional Director was required to undertake in the proceeding below. In *Brooklyn Excelsior*, PERB asserted jurisdiction over two New York charter schools finding that the charter schools were exempt from the NLRB's jurisdiction because they were

political subdivisions of New York State *as that term is used* under the NLRA. PERB determined that the charter schools at issue were created as "a direct result of enabling actions by two State entities, the [Regents] and the SUNY Trustees [i.e. the charter entity]." *Id.* at *19. PERB further noted that the schools were incorporated as New York State education corporations directly by the Regents to operate as autonomous public schools within New York's public school system and that the charter schools are accountable to public and State officials. *See id.* Accordingly, PERB determined that both charter schools were political subdivisions pursuant to Section 2.2 of the NLRA, and therefore exempt from Board jurisdiction.[7] *See id.* at *20.

Unlike the Court of Appeals decisions referred to by the Regional Director, PERB's decision in *Brooklyn Excelsior* addresses the exact inquiry the Board should undertake now. The Regional Director should have concluded that the holdings in in *DiNapoli* and *Smith* are irrelevant to the *Hawkins County* analysis and that PERB's decision in *Brooklyn Excelsior* comports with the appropriate analysis under the NLRA. As a result of the Regional Director's error, the Association's Request for Review should be granted.

[7] Subsequent to PERB's decision, the charter schools in *Brooklyn Excelsior* initiated a proceeding in New York State Supreme Court, Erie County seeking to vacate PERB's decision. The Erie County Supreme Court denied the charter schools' petition and the charter schools appealed to the New York State Appellate Division, Fourth Department ("Appellate Division"). *See Buffalo United Charter School, et. al. v. PERB*, 107 A.D.3d 1437 (4th Dep't 2013). In a decision dated June 7, 2013, the Appellate Division issued a non-final order holding the case "pending a determination of the NLRB whether the NLRA applies to collective bargaining matters herein" *Id.* at 1438. Motions for leave to appeal the Appellate Division decision to the New York State Court of Appeals were dismissed because the order appealed from was "non-final." *See Buffalo United*, 22 N.Y.3d 1082 (2014).

POINT II

THE REGIONAL DIRECTOR'S DECISION RAISES A SUBSTANTIAL QUESTION OF LAW OR POLICY BECAUSE OF THE ABSENCE OF, OR A DEPARTURE FROM, OFFICIALLY REPORTED BOARD PRECEDENT.

The Board will grant a Request for Review of a Regional Director's decision when "a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent." NLRB Rules and Regulations § 102.67(c)(1). There is no Board precedent asserting NLRB jurisdiction over charter schools established in New York State. Additionally, the Decision departs from officially reported Board precedent. Accordingly, the Board should grant the Association's Request for Review.

A. The Decision raises a substantial question of law or policy because there is no Board precedent asserting NLRB jurisdiction over New York charter schools

The issue in this Request for Review, whether the Regional Director properly asserted jurisdiction over Evergreen, is a matter of first impression before the NLRB. As will be discussed further herein, the Board's decisions asserting jurisdiction over charter schools in other states are now without precedential value. Moreover, the Regional Director's decisions in *Hyde Leadership Charter School v. United Federation of Teachers*, Case No. 29-RM-126444, and *Riverhead Charter School*, Case No. 29-RD-132061, are also without precedential value. Since there is no precedent asserting Board jurisdiction over a New York charter school, the Decision raises a substantial question of law – whether charter schools created by a New York government body, pursuant to an enabling statute, are political subdivisions of New York State, exempt from NLRB jurisdiction.

The Board routinely grants requests for review when a substantial question of law is raised in the absence of Board precedent. *See State Bar of New Mexico*, 346 NLRB No. 64

(2006) (granting Board review because the issue of whether the State Bar of New Mexico was exempt from the Board's jurisdiction as a political subdivision under Section 2(2) of the Act is a matter of first impression). Additionally, the Board also reviews matters transferred to it directly from a Region when there is no established precedent for a question of law or policy. *See Jervis Pub. Library Ass'n, Inc.* ("*Jervis Public Library*"), 262 NLRB No. 145 (1982) (accepting transfer of the case from the Regional Director because there was no precedent determining whether the Board should assert jurisdiction over public libraries). Here, the Decision raises a substantial question of law for which there is no Board precedent.

The NLRB's determinations in *Chicago Mathematics* and *Pennsylvania Cyber* are now without precedential value. On June 26, 2014, the United States Supreme Court held in *Noel Canning*, 134 S.Ct. 2550 (June 26, 2014), that President Obama's recess appointments of Board Members Sharon Block, Richard Griffin, and Terence Flynn were unconstitutional. As a result, the appointments of Member Block, Griffin, and Flynn were invalid. *See id.*

Under the NLRA, the Board may not legally operate without a quorum of three lawfully appointed members. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). The Board's decision in *Chicago Mathematics*, was issued by Board Chairman Pearce and Board Members Hayes, Griffin, and Block. Since the recess appointments of Members Griffin and Block were deemed unconstitutional, the Board decided *Chicago Mathematics* without a proper quorum.

Federal courts have consistently treated decisions of the Board issued without a quorum as lacking in precedential value. *See, e.g., Cnty. Waste of Ulster, LLC v. NLRB*, 385 Fed. Appx. 11 (2d Cir. 2010); *NLRB v. Domsey Trading Corp.*, 383 Fed. Appx. 46 (2d Cir. 2010); *St. George Warehouse, Inc. v. NLRB*, 394 Fed. App. 902 (3d Cir. 2010); *San Miguel Hosp. Corp. v. NLRB*, 2010 WL 4227318 (D.C. Cir. 2010). In addition, the Board itself has recognized that

when its own decisions are invalid for lack of a quorum they lack precedential value. *See, e.g.*, *Northeastern Land Services, Ltd.*, 2010 WL 4072835 (1st Cir. 2010) (granting NLRB's motion for remand in light of *New Process Steel* decision); *Chicago Mathematics*, Majority Op. at fn. 20. Thus, because *Chicago Mathematics* was decided without a proper quorum, the decision lacks precedential value. Moreover, because the Board's decision denying review in *Pennsylvania Cyber* relied almost exclusively on its prior decision in *Chicago Mathematics*, *Pennsylvania Cyber* also lacks precedential value. Moreover, in addition to the arguments concerning the precedential value of *Chicago Mathematics* in light of *Noel Canning*, *Chicago Mathematics* also lacks precedential value because that matter involved Illinois State law that is vastly different from the statutory framework under which Evergreen was created in New York. Indeed, a review of the differences between the New York and Illinois statutes reveals that *Chicago Mathematics* is inapplicable in the matter at hand.

Notably, the Board analyzed the creation of the charter school in *Chicago Mathematics* under Illinois's General Not-for-Profit Act, as the State of Illinois requires that individuals seeking to establish a charter school first form an independent non-profit corporation. *See Chicago Mathematics*, slip op. at *9. Therefore in *Chicago Mathematics*, the employer legally existed as a non-profit corporation before becoming a charter school. *See id.* The Board found that the private non-profit corporation, which was created by private individuals, then established the charter school. *See id.* Accordingly, the Board determined in *Chicago Mathematics* that the State of Illinois, by enacting its charter school law, "authorized individuals, *acting through private corporations*, to establish and operate charter schools . . . ." *Id.* (emphasis added).

Contrary to the statutory scheme in Illinois, under New York's Charter Schools Act, a charter school cannot legally exist until the Regents creates the charter school as a New York

State education corporation. *See* Education Law §§ 2851.3(c). Unlike Illinois, in New York, a public body, and not private incorporators, incorporates the charter school by issuing a certificate of incorporation, otherwise known as a provisional charter. Therefore, a charter school's creation in New York is wholly different than charter school creation in Illinois (and all other states for that matter). Notwithstanding these significant differences, the Regional Director nevertheless incorrectly determined that "Evergreen's Applicants and the other individual founding Trustees" created Evergreen. *See* Decision at p. 26. Because *Chicago Mathematics* is inapplicable to the manner in which New York Charter Schools are created, the Board should grant the Request for Review.

Finally, while the jurisdictional dispute in this proceeding was litigated before Region 29 in *Hyde Leadership Charter School v. United Federation of Teachers* ("*Hyde*"), Case No. 29-RM-126444, that decision is without precedential value.[8] Since *Hyde* is unreviewed, the Board cannot afford the decision any weight in determining the jurisdictional inquiry here. Pursuant to Section 9 of the NLRA, the delegation of powers to regional directors is subject to the Board's non-delegable authority to review their decisions. *See* 29 U.S.C § 153(b). It is well-established in NLRB jurisprudence that unreviewed decisions of regional directors have no precedential value. *See S.H. Kress & Co.*, 212 NLRB No. 12, fn. 1 (1974) ("We do not attach any weight in this proceeding to the Regional Director's determination in [a prior] case since we have long held that Regional Director's [*sic*] decisions do not have precedential value..."); *see also Virtua Health, Inc.*, 344 NLRB No. 76, fn. 2 (2005); *In re Boeing*, 337 NLRB No. 152, 153, fn. 4 (2001); *In re Rental Uniform Service*, 330 NLRB No. 334, 336, fn. 10 (1999); *Central Nat. Bank*

[8] Subsequent to the Regional Director's decision in *Hyde*, the union in that matter filed a Request for Review with the National Labor Relations Board. On August 6, 2014, the NLRB granted the union's Request for Review.

& Trust Co., 208 NLRB 105, fn. 2 (1974). Accordingly, the decision in *Hyde* does not constitute a determination of the NLRB, and is without precedential value.

The Decision and Direction of Election rendered in *Riverhead Charter School*, 29-RD-132061 is similarly unavailing, as the Regional Director relied heavily on *Hyde*, which is currently under review, in asserting jurisdiction over Riverhead Charter School. Notably, the union filed a Request for Review of the *Riverhead Charter School* decision with the NLRB on or about September 8, 2014. The NLRB has yet to act on this Request for Review.

In sum, there is no official Board precedent asserting jurisdiction over New York State charter schools. Accordingly, the Decision raises a substantial question of law and the Association's Request for Review should be granted.

B. The Decision raises a substantial question of law or policy because it departs from Board precedent holding that political subdivisions are exempt from Board jurisdiction

The Board should also grant the instant Request for Review because the Decision departs from established precedent exempting similar political subdivisions from the NLRB's jurisdiction. As argued above, Evergreen is a political subdivision because it was created directly by the Regents to constitute an administrative arm of government and because it is administered by individuals who are responsible to public officials or the general electorate. *See Hawkins County*, 402 U.S. at 604-05. The Board has repeatedly found employers who share the same attributes as Evergreen to be political subdivisions of New York State and therefore exempt from NLRB jurisdiction. In failing to apply this precedent to Evergreen, the Decision raises a substantial question of law or policy. Accordingly, the Board should grant the Association's Request for Review.

In *New York Inst. for the Educ. of the Blind* ("*Institute for the Education of the Blind*"), 254 NLRB No. 85, the Board determined that the employer, an educational and residential care facility operating in New York, was an agent and administrative arm of the State and therefore exempt from the Board's jurisdiction. Similar to Evergreen, the employer was created through a legislative act. Moreover, just as Evergreen's purpose is to provide a public education to students of the local school district, the employer's purpose in *Institute for the Education of the Blind* was to provide a suitable education to eligible residents of the State of New York. *See id.* at 4. The Board also found the employer subject to many of the same oversight requirements as Evergreen. Like Evergreen, the employer in *Institute for the Education of the Blind*, operated under the supervision of the Regents, was subject to visits by the New York State Commissioner of Education, and was subject to audits of the State Comptroller. *See id.* at 3-5. In determining that the employer in *Institute for the Education of the Blind* was a political subdivision, the Board found that it was an agent and administrative arm of the State and exempt from the NLRB's jurisdiction under the Act. *See id.* at 5.

In *Jervis Pub. Library*, 262 NLRB No. 145, the Board found that a public library responsible for providing educational services to the public was also exempt from Board jurisdiction. Like Evergreen, the employer in *Jervis Public Library* was publically funded, directly employed its employees, set its own policy concerning sick leave, hiring and firing, and wages, and was required to submit its annual budget to the State. *See id.* at 2. Considering these factors, the Board concluded that the employer in *Jervis Public Library* was an agent of the state and an administrative arm of the government. *See id.* at 3.

Despite possessing the same attributes that the Board found relevant in *Institute for the Education of the Blind* and *Jervis Public Library*, the Regional Director's Decision nevertheless

found that Evergreen is not a political subdivision. The Decision departs from established precedent and therefore raises a substantial question of law or policy. Accordingly, the Board should grant the instant Request for Review.

POINT III

THE BOARD SHOULD GRANT THE REQUEST FOR REVIEW BECAUSE THERE ARE COMPELLING REASONS FOR THE BOARD TO DECLINE JURISDICTION OVER NEW YORK STATE CHARTER SCHOOLS.

As demonstrated herein, the Decision improperly held that Evergreen is subject to the Board's jurisdiction because it is not a political subdivision of New York State. The Request for Review should therefore be granted to remedy the Regional Director's erroneous determination.

Alternatively, however, Section 14(c) of the Act provides the Board with the discretion to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction." 29 U.S.C.A. § 164(c)(1). In determining whether to decline jurisdiction under this section of the Act, the Board often takes into account a number of factors in addition to whether the dispute has an effect on interstate commerce. For example, the Board has consistently declined to assert jurisdiction over the horse-racing and dog-racing industries. *See Yonkers Raceway, Inc.*, 196 NLRB No. 81 (1972); *Meadow Stud, Inc.*, 130 NLRB No. 121 (1961); *Jefferson Downs, Inc.*, 125 NLRB No. 58 (1959); *Hialeah Race Course, Inc.*, 125 NLRB No. 57 (1959). In support of this policy, the Board cited to both the local nature of these industries as well as additional factors, including state regulation of labor relations for these industries. For example, in *Hialeah Race Course*, the Board reasoned both that "racetrack operations are essentially local in nature" and further that because "racetrack operations, which are permitted to operate by reason of special State

dispensation, and are subject to detailed regulation by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consonant with their basic policy." *Hialeah Race Course*, at 391.

The Second Circuit upheld the Board's discretion to decline jurisdiction on grounds other than effects of the dispute on commerce. *See New York Racing Assoc. v. NLRB*, 708 F.2d 46 (2d Cir. 1983). The Court read section 14(c) to give the Board discretion to decline jurisdiction on grounds not strictly limited to effects on commerce. In *New York Racing Assoc.*, the Second Circuit expressly held that the Board "properly considered such factors as the extensive state regulation of the horse racing industry, the 'unique and special relationship' between the states and the industry, the relative infrequency of labor disputes in the industry, the sporadic and short-term employment, marked by high turnover, and the difficulty thereby posed for effective Board regulation, and the Board's current workload." *Id.* at 54.

Should the Board in this matter determine that Evergreen is subject to the jurisdiction of the NLRB, the Association submits the instant Request for Review because there are compelling reasons for the Board to decline jurisdiction over New York State charter schools since public education is a matter of local concern to New York State and because the Legislature intended charter schools established in New York to be public schools subject to the regulation of the Taylor Law. As such, even if the Board determines that Evergreen is subject to NLRB jurisdiction, it should grant the Association's Request for Review to properly consider whether it should decline to exercise jurisdiction over New York charter schools.

It is well-established that responsibility for public education is perhaps the most important role of the states, and an area in which there is a substantial state interest. *See e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1

(1973); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 410 (1977) (stating that "local autonomy of school districts is a vital national tradition"); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J. concurring) (finding that "it is well-established that education is a traditional concern of the States"). Public education is also highly regulated state by state, and charter schools established in New York are no exception to this strict and comprehensive regulatory oversight.

For these reasons, New York should be permitted to continue to fully and freely promulgate policies concerning public education, including the manner in which charter schools are regulated. By declining to exercise jurisdiction over New York charter schools the Board would simply permit New York full control over its educational policies, an area that is traditionally a matter of local concern.

Moreover, while the legislative intent of an enabling statute is not controlling in the Board's determination as to whether an entity is a political subdivision under the Act, the legislative history of New York's Charter Schools Act is worthy of special consideration. In New York, the Legislature *expected* charter schools to be public schools.

The Charter Schools Act is replete with instances directly defining charter schools as public schools. At the outset, the stated purpose of the Charter Schools Act is to "provide parents and students with expanded choices in the types of educational opportunities that are available within the *public school system*." Education Law § 2850.2(e) (emphasis added). Additionally, the Charter Schools Act classifies charter schools as "independent and autonomous public school[s]." Education Law § 2853. Pursuant to the Charter Schools Act, "[t]he powers granted to a charter school under this article constitute the performance of essential public purposes and governmental purposes of [New York State]." Education Law § 2853.1(d).

Indeed, on March 31, 2014, the Legislature amended the Charter Schools Act to firmly establish that charter schools are political subdivisions of New York State. In this amendment, the Legislature plainly stated that a charter school is "a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located." Education Law § 2853.

This delineation throughout the Charter Schools Act is not mere characterization. From creation to operation to closing, the Charter Schools Act strictly regulates the educational policies, financial oversight, labor relations, and ultimately whether a charter school continues to exist after the initial five-year provisional charter expires. The Board should therefore defer to the Legislature's unequivocal desire to make New York charter schools public schools.

As established herein, after a charter school is incorporated by the Regents, it is subject to site visits and examinations by the Regents and charter entity. *See* Education Law §§ 2853.2; 2853.2-a. The purpose of these visits is to ensure that the charter school complies with "applicable law, regulations, and charter provisions." *Id.* Charter schools in New York must meet the same civil rights and student assessment, including special education requirements applicable to other public schools. *See* Education Law §§ 2854.1(b); 2853.4(a). Charter schools are also subject to the audit requirements contained in the charter. *See* Education Law § 2854.1(c).

Moreover, the Charter Schools Act regards charter school teachers as public school teachers. Charter school teachers, with limited exceptions, must be certified in accordance with the requirements applicable to other public schools. *See* Education Law § 2854.3(a-1). And notably, unlike employees of privately operated schools in New York State, charter school

employees may be deemed employees of the local school district for purposes of participation in the New York State's Teachers' Retirement System. *See* Education Law § 2854.3(c).

Additionally, the Charter Schools Act declares that charter schools are public employers and their employees are public employees subject to New York's Taylor Law. *See* Education Law § 2854.3. The New York State agency responsible for enforcing the Taylor Law, PERB has repeatedly asserted jurisdiction over charter schools established in New York State. *See Buffalo United Charter Sch. v. PERB*, 107 A.D.3d 1437 (4th Dep't 2013), *lv. denied*, 22 N.Y.3d 1082 (2014); *Corcoran and KIPP Academy Charter School (UFT)* ("*KIPP Academy*"), 45 PERB ¶ 3013 (2012); *UFT (Sisulu-Walker Charter School of Harlem)*, 44 PERB ¶ 4018 (2012). Indeed, the Association filed a petition for certification before PERB, Evergreen voluntarily recognized the Association, and a certification issued. *See* Joint Ex. 17. As a result of this certification, the Association and Evergreen have enjoyed a lengthy and established collective bargaining relationship. Therefore, unlike in *Chicago Mathematics*, there is a direct issue of comity before the Board.

The principles of comity suggest that "[a]rrangements resulting from state agency proceedings should generally be respected if consistent with federal policies." *See Long Island Coll. Hosp. v. NLRB and Local 144, Hotel, Hosp., Nursing Home and Allied Servs. Union, SEIU, AFL-CIO*, 566 F.2d 833 (2d Cir. 1977). In this sense, comity "reflects the desirability of supporting settled relationships in the absence of compelling countervailing reasons." *Id.* at 841-42. Not only would assertion of Board jurisdiction violate the Board's own established principles of comity, but, the assertion of Board jurisdiction would also unduly alter the relationship between the Association and Evergreen in a manner inconsistent with the NLRA's purpose of fostering industrial peace. Importantly, there has been no change in state or federal

law or Board law which would allow for the assertion of jurisdiction over New York charter schools. Indeed, the recent changes to the Charter Schools Act only serve to strengthen the Association's argument that charter schools established in New York State are political subdivisions of the State. Accordingly, the NLRB should apply its long-standing principle of comity to the PERB's certification of the Association and assertion of jurisdiction over Evergreen.

In addition, the Charter Schools Act specifically requires that some charter schools become part of the same collective bargaining unit that represents the employees in the school district where the charter school is established. *See* Education Law § 2854.3(b). These charter schools are called conversion charter schools because they were converted to charter status from existing traditional public schools within a school district. *See* Education Law § 2854.3(b). Further, the Charter Schools Act also provides that if the initial student enrollment of the charter school exceeds 250 students, then the employees of the charter school, who are eligible for representation under the Taylor Law, are deemed to be represented by a separate negotiating unit at the school by the same employee organization that represents employees in which the charter school is located. *See* Education Law § 2854.3(b-1). It would be irrational for PERB to retain jurisdiction over some charter school employees (i.e. conversion charter school employees) while subjecting other charter school employees to the jurisdiction of the NLRB.

If the NLRB exercises jurisdiction over New York charter schools, other aspects of the Charter Schools Act will be undermined. Most notably, the Regents and the charter entity would be without ability to enforce Education Law § 2855.1(d), which provides that a charter may be revoked when PERB makes a determination that a charter school has engaged in a pattern of egregious and intentional violations of the Taylor Law.

In enacting and amending the Charter Schools Act, the Legislature intended charter schools to be political subdivisions of New York State subject to the same laws governing labor relations as every other public school. Accordingly, even if the Board finds that Evergreen is not a political subdivision of the State under the Act, the Board should grant the Request for Review to give purposeful consideration as to whether the Board should decline to exercise jurisdiction over New York charter schools.

CONCLUSION

For all of the forgoing reasons, the Association respectfully requests that the Board grant the instant Request for Review.

Dated: New York, New York
June 13, 2016

Respectfully Submitted,

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NATIONAL LABOR RELATIONS BOARD

EVERGREEN CHARTER SCHOOL,

Employer,

and

ALISON GREENE,

29-RD-175250

Petitioner,

and

EVERGREEN CHARTER STAFF ASSOCIATION, NYSUT, AFT,

Union.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the Union's Request for Review of the Regional Director's Decision Dated May 27, 2016 in the above-captioned case have this day been served by email and regular mail upon the following counsel at the addresses listed below:

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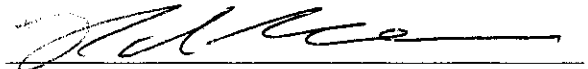

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